United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued by:
Thomas P. O'Sullivan

Docket No. 74-2399

B
P/S

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

—against—

GUISEPPE BARBERA,

Appellee.

Appeal from an Order Granting Defendant's Motion to Suppress by the United States District Court for the Northern District of New York

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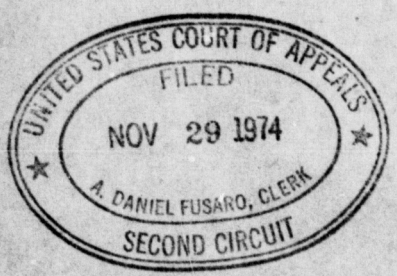
BRIEF FOR APPELLANT



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CORRECTIONS TO APPELLANT'S BRIEF

POINT I

page 6; third full paragraph; line 8; the word fundamental should read functional.

page 9; second full paragraph; third line from the bottom; the word Congressional should read Constitutional.

POINT II

page 19; first paragraph of Point II; line 7; eliminate the word not between the words may and (not) be.

page 20; first full paragraph; third line from the bottom; after the first word proceeds insert the phrase "directly south through Malone", and then insert the phrase "Route 37 connects" before "to the border crossing at Ft. Covington." so that it will read:

> "Route 30 connects to the border crossing at Trout River and proceeds directly south through Malone; Route 37 connects to the border crossing at Ft. Covington and proceeds southeast through Malone where it converges into Route 30 and proceeds south into the interior."

POINT III

page 28; first full paragraph; last line; the word of should read as.

page 30; first full paragraph; line 4; the word or should read of.

page 36; second full paragraph; line 4; the word simple should read single.

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ISSUES PRESENTED

I. What is the Rule of law enunciated by Almeida-Sanchez with respect to intrusions without warrant or probable cause?

II. Is Malone, New York, the functional equivalent of the border?

III. Is the roving patrol unreasonable?

IV. Was the detention of this particular bus reasonable?

STATEMENT OF THE CASE

On April 3, 1974, the defendant Guiseppe Barbera was charged by information with violation of Title 8, United States Code, Section 1325, by illegally entering the United States by eluding inspection. On April 24, 1974, defendant moved to suppress certain evidence obtained from his person, to wit: his passport and bus ticket. On September 27, 1974, a suppression hearing was held in the United States District Court for the Northern District of New York, with the Hon. Judge Edmund Port presiding, at Syracuse, New York.

Pursuant to the stipulation of the parties the only issue to be decided with respect to the grounds for suppression of the evidence was whether the detention and subsequent interrogation of the passengers on the bus which the defendant was riding, was permissible, under the ruling rendered by the United States Supreme Court in Almeida-Sanchez v. United States, 413 U.S. 266; 93 S.Ct. 2535 (1973).

The facts of the case, indicated that the defendant boarded a bus at Massena, New York, which by schedule traveled non-stop to Malone, New York, but which was known to make unscheduled stops enroute to Malone. A border patrol agent, Agent Cowan, pursuant to his routine duties, while on a roving patrol in the area of the Border Patrol line station at Malone detained the bus at the regular stop in Malone.

After inquiry of the bus driver he learned that the bus had not picked up any passengers enroute to Malone but also that the bus had not been checked in Massena. Accordingly, pursuant to his duties, he interrogated the passengers as to their citizenship. The defendant did not respond to his questioning which created the suspicion that he was an alien, and accordingly, he was directed off the bus for further interrogation.

The subsequent interrogation revealed that he was an alien and that he did not possess any valid travel documents and accordingly he was placed under arrest and his passport and bus ticket were seized as evidence.

On September 30, 1974, the District Court granted the defendant's motion to suppress holding that Malone, New York, was not the functional equivalent of the border for purposes of a border search, on the facts of this case, under the rationale of Almeida-Sanchez, supra.

The United States takes this appeal pursuant to Title 18, United States Code, Section 3731, to review the propriety of the order suppressing the evidence.

POINT I

ALMEIDA-SANCHEZ DOES NO MORE THAN APPLY THE RATIONALE OF TERRY v. OHIO TO THE BORDER SEARCH SITUATION.

The Court in Almeida, disallows analogy to the automobile cases, exemplified by, Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1924), and rightly so since these cases are predicated upon probable cause. The Court, also, does not see any connection between this situation and the administrative or regulatory type of search cases, since even in these cases where a warrant was not required, exemplified by, Colonnade Catering Corporation v. United States, 397 U.S. 72, 90 S.Ct. 774 (1970), the predicate for allowing the intrusion is based upon the tacit consent of those who were regulated by virtue of the fact that they were voluntarily engaged in a regulated business enterprise and therefore had consented to a reasonable intrusion based upon the need of the regulatory agency to efficiently perform its function, which is distinct from the situation at hand, where it cannot be argued that travelers within the United States have consented to be queried as to their citizenship by the mere fact that they are traveling within one hundred air miles from an external boundary.

The check of airline passengers, for weapons, to prevent hi-jacking, United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973), and the routine motor vehicle check for driver's licenses, United States v. Craft, 429 F.2d 884 (10th Cir. 1970) can also be distinguished on the ground that there has been consent to the limited intrusion, although the situations may be less distinct, especially, in the motor vehicle check case.

In the situation before us we do not have probable cause nor consent and therefore those cases are inapplicable. In fact the statutory powers in question here were never thought to be justified on either of those principles. The prior justification was based upon the right, inherent in the sovereign, to protect itself and the national security, which arguable exists wholly apart from the Constitution, but which also can be found within the Constitution to provide for a common defense and the general welfare, and pursuant to such authority the Congress can legitimately exclude undesirable aliens, and pass legislation to protect the nation's boundaries against the illegal entry of aliens. See, for example, Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963).

The Circuit Courts, having concluded that the legislation was enacted pursuant to a legitimate goal perfunctorily upheld its constitutionality. The Court in Almeida-Sanchez v. United States, supra, at 93 S.Ct. 2537, is faced with the issue of whether that legislation can usurp the specific right of the individual granted by the Fourth Amendment even where the legislation is designed to achieve a legitimate Congressional goal. The Court correctly recognizes that simply finding that the legislation is enacted pursuant to a legitimate goal is insufficient where such legislation infringes upon a fundamental right. The traditional test where legislation infringes a fundamental right is that there be a compelling state interest which overrides the fundamental

right and an affirmative showing that the state interest cannot be achieved without the infringement of that right. (Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969) (A right to travel case)).

Note the Almeida Court's language, at 93 S.Ct. 2539, to the effect "that no act of Congress can authorize a violation of the Constitution." The Court's conclusion is that even where legislation is enacted to achieve a legitimate goal it must nevertheless be consistent with the Constitution. The Congress has the right to exclude aliens and to protect the borders from the illegal entry of aliens, but in exercising that right it must do so in conformity to the Constitution.

Drawing upon the facts of that case the Court finds that the national interest involved there, i.e., the protection of the border, can reasonably be achieved by routine checks of individuals and conveyances crossing the border, and by further checking at established points within the United States, near the border, which because of their strategic location, such as a point marking the confluence of two or more roads extending from the border, would be appropriate checkpoints to detect those seeking to circumnavigate the designated checkpoint at the border, and therefore could be considered the functional equivalent of the border, thereby making a border type intrusion justifiable, under the Fourth Amendment, because of the need of the agency to make such intrusions to protect the national interest. (See, 93 S.Ct. 2539).

In so doing, the Court, on the facts of that case, found the detention and search of an automobile on a road some twenty miles distant from the border, objectionable, under the Fourth Amendment, since the only basis offered to justify the detention was the mere fact that the vehicle was found to be traveling within one hundred air miles of the border and therefore could be detained, pursuant to the statute.

The facts of that case, indicated that there was some suspicion to believe that illegal entrants might be traveling on that road, but there was no showing that such suspicion required or made necessary the intrusion that was made at that particular point.

It is important, to note, therefore, what the Court does not hold. The Court does not hold that the protection of the border against illegal entrants is not a legitimate national interest. Moreover, it does not hold that this interest does not override the individual's right to privacy. It furthermore does not hold that detentions cannot be made within the United States. Nor does it hold that detentions made by roving patrols are per se unreasonable under the Fourth Amendment, which seems to be the conclusion drawn by the Ninth and Fifth Circuits. (See, United States v. Bowen, 500 F.2d 960, 962 (9th Cir. 1974); and United States v. Daly, 493 F.2d 395, 396 (5th Cir. 1974)).

The distinction of the method used in making the detention can hardly be controlling as to the issue of whether the detention, itself, is permissible under the Fourth Amendment, as both the Ninth and Fifth Circuits recognize. See, United States v. Bowen, supra, where the Ninth Circuit finds a detention made at a fixed established checkpoint unreasonable because that point was not the fundamental equivalent of the border; and United States v. Speed, 497 F.2d 546 (5th Cir. 1974), which invalidated a detention at a temporary checkpoint because it was not based upon reasonable suspicion that the activity to be detected was occurring nor was that point shown to be the functional equivalent of the border.

Therefore, the fact that the detention is made at an established or temporary checkpoint does not make it reasonable if it is not predicated upon reasonable suspicion and need, and similarly where the detention is made by a roving patrol it may be reasonable if it was predicated upon reasonable suspicion and need. (See,

United States v. Daly, supra, at 396, indicating that a particular stretch of road may be the functional equivalent of the border, and the only effective method of detection may be a roving patrol).

Correctly interpreted, all that Almeida-Sanchez says is that in order for a detention for interrogation or seizure of the person or a search incident to such seizure to be permissible, regardless of whether it be pursuant to a legitimate congressional enactment, it must be consistent with the rule for a permissible detention, without warrant and without probable cause under the Fourth Amendment.

The border detention, interrogation, and search situation is not a probable cause case, nor is it realistically speaking a consent case, although where it is conducted at the border itself it may be arguable that it is predicated upon consent, but unlike other consent cases where there is an element of choice not to consent by not engaging in a regulated industry or business or by using a mode of transportation other than an aircraft or by not driving an automobile, the element of choice in the border situation, not to cross the border, is extremely slight, since one could conceivably get to his destination by other modes of transportation but one could not cross the border at all unless he consented to the intrusion. Moreover, where the "border search" situation is once removed from the border itself, such as at points deemed the "functional equivalent" of the border, within the United States, which the Supreme Court recognizes may be permissible, the argument that the intrusion is justifiable on grounds of tacit consent is founded upon very dubious grounds in view of the fact that the detainee may never have crossed the border.

The cases decided after Almeida are seemingly stymied as to how a border type detention, etcetera, at a point away from the border can be justified, under the Fourth Amendment, where there is no more reason to believe

that the detainee has crossed the border than to believe that he has not crossed the border. (See United States v. Bowen, supra, and United States v. Daly, supra).

Much of the confusion, with respect to this point, results from focusing on the concurring opinion which tangentially seeks to justify the roving patrol by arguing that the situation is akin to the regulatory search of buildings in Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967), and therefore a roving patrol might be permissible with less than probable cause if a warrant were obtained. However, the reasoning of the concurring opinion makes two assumptions that cannot be read into the majority opinion. It first assumes that the roving patrol is per se unreasonable, and implies that had the detention been made at a fixed permanent or temporary checkpoint it would have been somehow made reasonable, even though the majority's basis for finding the detention unreasonable was that there was no probable cause or even reasonable suspicion to believe that the activity to be detected was occurring at that point and no showing that the intrusion was necessary at that point in order for the agency to carry out its function. Therefore, as the cases decided after Almeida point out, the mere fact that the detention is made at a fixed checkpoint, whether temporary or permanent, is no basis for its justification under the Fourth Amendment. Accordingly, the manner in which the detention is made is not controlling, and a mobile spot checking system may be permissible in appropriate circumstances. Second, the reasoning of the concurring opinion suggests that a border type search is a regulatory search based upon tacit consent, which is a rationale which is explicitly rejected by the majority opinion.

This confusion is further compounded by the overemphasis upon the phrase "functional equivalent of the border" and attempts to bring the cases within the definition suggested by the Supreme Court, i.e., a point

near the border, marking the confluence of two or more roads extending from the border, which magically allows the court to dispense with the Fourth Amendment if such a point can be established, whereas the suggested definition is obviously no more than that - a suggested definition, which may or may not be the functional equivalent of the border depending upon whether the circumstances of the case indicate that the conditions which make the intrusion at the border necessary also make an intrusion at this point necessary.

The test for determining whether a particular point is the functional equivalent of the border is therefore whether the same conditions which justify a detention at the border exist at the interior point.

It should be clear from the Almeida rationale that "Congress cannot authorize a violation of the Constitution," that the border, itself, is also not a sanctified area where the Constitution need not be considered by Government officials. The exercise of the national right of self-protection must still conform to the Constitution even at the border. If not, then it is difficult to make any sense out of the case at all, since if Congress can determine that one area is immune from Constitutional protection because of national security, then what reason is there to dispute the Congressional judgment in another area. More to the point, if Congress can say a two mile strip on the border is immune, why not a 100 mile strip? Because it would be unreasonable, of course, but does that not substitute a judicial judgment for the Congressional judgment, and isn't that possible only when the Constitution has been contravened? Why is the 100 mile strip unconstitutional or unreasonable and the two mile strip not equally defective if both are based upon the Congressional judgment that the strip should be immune from Congressional protection in order to protect the national interest of self-protection? In neither case are the intrusions based upon probable cause or

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the Fourth Amendment, and it is only unreasonable searches and seizures or detentions that the Constitution prohibits. The determining factor here as to the balancing of the two rights is reasonable suspicion to believe that the activity to be detected is occurring. Where there is such a suspicion the intrusion is reasonable if the activity cannot be detected without the intrusion.

The detention at the border is permissible because it is predicated upon reasonable suspicion that the activity to be detected is occurring and the need to make the intrusion in order to detect the activity, despite the lack of a warrant or consent or probable cause, even though as a general rule a detention or seizure of a person without a warrant or probable cause or consent is per se unreasonable.

There is however, a line of cases, which establish a well recognized exception to the requirement of a warrant and probable cause. These are the cases predicated upon reasonable suspicion and need, which is precisely the situation we have here. The best in terms of providing a test of universal application is Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), where the principle was first enunciated.

In Terry, the Court reasoned that where a police officer has a reasonable suspicion, short of probable cause, that a crime, which he is charged with preventing and detecting, has been or may be committed, the people's right of protection from such activity outweighs the individual's right to privacy, and allows a limited intrusion consisting of a temporary detention or seizure of the person, for the limited purpose of a limited interrogation, based upon and related to the suspicion, and to the needs of the officer to detect the activity he suspects.

In simplified form, the test for a permissible warrantless intrusion without probable cause is whenever the

situation meets the two-pronged test of the existence of a reasonable suspicion that the activity sought to be detected is occurring and the existence of the need to make the intrusion in order to confirm or dispel that suspicion.

Note that the intrusion must be tailored to both the officer's need and the suspicion. If the officer could investigate and satisfactorily resolve the suspicion without the intrusion then the intrusion would be unreasonable. In some circumstances surveillance or resort to other sources of information may be available which would make the intrusion unreasonable, which is the case in the usual investigation process. However, in the "reasonable suspicion" case the suspicion always concerns a crime that has recently been committed, and there is always an immediate need to take action before the suspect departs from the officer's area of control. Consequently, there is usually no other way to obtain information which would negate the need for the intrusion.

Moreover, the suspicion must be based on factual knowledge that would lead a reasonably prudent person to suspect that the activity sought to be detected is occurring. A loiterer at a bus stop at three in the afternoon is obviously not suspicious, whereas, a loiterer behind a bank at three in the morning may arouse considerable suspicion. The manner of the detention must also be reasonable. Approaching a loiterer behind a bank at three in the morning with a drawn gun may not be unreasonable, whereas, doing so at three in the afternoon perhaps would be unreasonable.

The scope of the intrusion must also be reasonable, and the sequence of the permissible scope of an intrusion under Terry is important. It only allows a temporary detention or seizure of the person for the limited purpose of interrogation related to the suspicion. If a bank robbery is suspected an interrogation with respect

to the sale of drugs would be unreasonable. Moreover, it does not allow an arbitrary search of every detainee, however, a search may be permissible based upon other factors which create a reasonable suspicion that a search is necessary, such as the suspicion, that because of the nature of the crime suspected, the person to be interrogated may have a weapon, and therefore because of the need to protect the officer a limited pat-down search would be permissible, which was the situation in Terry. However, a similar search for weapons, with respect to the function of an immigration officer in conducting a border situation interrogation, would not logically be permissible, since in the latter situation the investigatory interrogation relates more to a regulatory function than to the detection of a criminal offense where there is reason to suspect that a weapon might be used. Moreover, since the border situation deals with an institutionalized suspicion, i.e., everyone is suspect, whereas, in the Terry type situation a specific suspect is involved, the probability that every detainee at the border is carrying a weapon is extremely slight and therefore an arbitrary weapons search would be unreasonable.

In the border situation the interrogation may present facts which would then make a search reasonable, because of the added suspicion those facts created, such as where the individual does not present any identification, or where a vehicle, itself, raises a suspicion that an alien may be secreted within, such as where the vehicle is riding low in the front or back, or because it is a type which facilitates such a use, or where it appears from observation that the back seat has been tampered with or removed, or where the trunk is not completely closed, etcetera.

Furthermore, the scope of the search would be limited to the basis of the suspicion to search. Searching the glove compartment for identification would be permissible, whereas, looking under the hood of the car would not, but if a secreted alien were sought the reverse would be

true. Checking the trunk of the vehicle for an alien would be permissible, but searching a suitcase within the trunk would not, unless there were other factors which created a suspicion making it necessary to look into the suitcase, such as, where the suitcase is imprinted with a name different than the name on the identification proffered by the vehicle's occupant, which arouses the suspicion that he may be smuggling or assisting the smuggling of an alien, or that he may be an alien with false documentation. There may also be a suspicion created which is unrelated to the officer's specific function and unrelated to the original suspicion and basis for the initial detention, such as, where the suitcase in the trunk is covered with blood, or where the officer detects the strong odor of marijuana emanating from the suitcase. If the initial intrusion were reasonable then the search pursuant to a valid but unrelated suspicion would also be reasonable.

Almeida-Sanchez does no more than to apply the traditional Terry rule for permissible intrusions without a warrant or probable cause to the border search situation. Note, that in Almeida the Court specifically states that it was not contended that the detention and subsequent search was based upon the rationale of "reasonable suspicion" for a detention found permissible in Terry. (See, Almeida-Sanchez v. United States, supra, at 93 S. Ct. 2537).

It's not clear what facts were presented or how they were presented in the Almeida case, but if the Terry test is applied two plausible rationales for the result reached are apparent. First, the initial intrusion or detention was not based upon reasonable suspicion that the criminal activity to be detected was occurring at the point where the detention was made. Apparently that point was not argued other than to assert that many aliens were apprehended on that particular road. It therefore, presumably, was not argued that because of the geographic characteristics of the area, and the

limitations of the manpower allocation, and the institutional knowledge of the agency with respect to the operations of smugglers, that it was reasonable to suspect this particular vehicle on this particular road and necessary to make a detention at that particular point. Arguably, if reasonable suspicion and need for the intrusion had been shown then the initial detention would have reasonable under Terry.

However, one of the underlying features of these cases is the tendency of courts to find objectionable the apparent boot-strapping technique of an ostensible detention and search for aliens when the real purpose is to search for contraband, particularly drugs. Almeida is that type of case. Even if it is assumed that the initial detention was lawful the scope of the intrusion there certainly went beyond the permissible scope of the Terry rationale. The detainee sufficiently established his right to be in the country and therefore the only remaining question was whether he had secreted an alien within the vehicle. The fact that the vehicle was some 25 miles north of the border on a road that did not have a fixed checkpoint and was not regularly patrolled certainly mitigates against the suspicion that an alien was cramped under the hood or in the trunk or behind the back seat. The only reason apparently offered to justify the search behind the back seat was the official bulletin that aliens were sometimes concealed behind the back seat. The facts presented here, however, would seem to negate the institutionalized suspicion.

A possible argument could have been made to justify the search predicated on the facts that the detainee was a Mexican alien with a work permit who had recently arrived from Mexico and according to his story had picked up the car in the United States for the purpose of delivering the car to someone in California and he then expected to return to Mexico. Further interrogation as to this matter may have raised a reasonable

suspicion that he might be transporting aliens, which may have justified the search or may have given rise to probable cause to believe he was transporting contraband. However, that procedure was apparently not followed, and on the facts then known there was significantly more reason to suspect that he was transporting contraband then to suspect he was transporting an alien.

The general rule, however, even before Almeida is that a search for contraband requires probable cause, whereas, a search for aliens does not. Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969). The distinction applied there was that a search for aliens was authorized by statute, whereas, a search for contraband was not.

Applying the reasonable suspicion and necessity of the Terry rationale the distinction is that the need to search for contraband at an interior point is less compelling than the need to search for aliens at an interior point, since it is common practice for smugglers of aliens to have the alien walk across the border to circumvent the checkpoint and to then pick up the alien and take him to a relatively safer interior point where he, the alien, can obtain other transportation, therefore, as a matter of practicality he can only be detected at an interior point. Whereas, the smuggler of contraband is not likely to attempt walking across the border with the contraband on his person, since he then would lose the defense of an unknowing possession, and unless it were something easily transportable it would be too difficult, and involve too many accomplices, moreover if it were something he could hide on his person it's likely he could successfully secrete it in the car so as to avoid detection by a cursory customs search, therefore he is most likely going to enter at the designated entry point or by automobile on a back road, which are protected by sensors, indicating when entries are made on such roads, and the procedure when that occurs is to put the vehicle under surveillance and if it does

not report to a designated entry point for inspection it is stopped, and at that stage even if the suspect is not an alien there is probable cause to search for either aliens or contraband.

Accordingly, the need for an interior search for contraband is not as great, since the detection procedures, with respect to contraband, at the border are more efficient than the procedures with respect to detection of illegal entrants. In this regard another procedure used by alien smugglers is to supply them with documentation to effect the entry, which they then retrieve once the alien is deposited at a safe interior point.

Moreover, since the need for an interior search for contraband illegally imported into the United States is less due to the better protection in detecting that activity at the border then it also follows that there is less reason to suspect that a detainee at an interior point is concealing illegally imported contraband. The search for contraband therefore cannot be predicated upon the Terry rationale, since it fails to meet the two-pronged test of reasonable suspicion and needs under Terry.

The result in Almeida, which probably was the correct result on the facts, could have been arrived at by the application of Terry, in that, either the initial detention was unreasonable because of the lack of a showing a reasonable suspicion and need, or the scope of the intrusion was unreasonable for lack of reasonable suspicion and need for the search which was related to the suspicion and need which justified the initial detention, and no further factors were developed by interrogation which would have established probable cause for a search unrelated to the basis for the initial detention.

The Court in Almeida-Sanchez does not explicitly state that it is applying the Terry test to the border search situation, but it is certainly clear that the Court's

position is that in order to justify such a search, regardless of whether it is authorized by statute, the intrusion must be in conformity with the Fourth Amendment, even at the border, itself.

The only justification for the intrusion even at the border is the continuing institutionalized suspicion that anyone crossing the border may be an alien not entitled to enter, and the only way to detect those who are such aliens is to make a temporary detention for purposes of a limited interrogation, i.e., the intrusion is necessary in view of the function.

If that justification, which is the only logical justification, is not the Terry rationale then to paraphrase the Court it is the functional equivalent of the Terry rationale. Moreover, since the factual situation even at the border involves an intrusion without a warrant or probable cause or consent then the only permissible justification under the Fourth Amendment is the Terry rationale.

Therefore, even though it is not explicit that the Court was simply applying the Terry test to the border situation the necessary implication is that in effect that is what was done, unless it is concluded that the Court simply found the border and the magical functional equivalents of the border immune from the mandates of the Constitution. If the latter conclusion is argued, however, then the case simply does not make sense and is therefore impossible to apply.

The only intelligible way to determine whether an interior point is the functional equivalent of the border is to apply the test that permits the intrusion at the border to the circumstances pertaining at the interior point. If no sensible test can be applied then the determination of whether an interior point is the functional equivalent of the border depends on the length of the Judge's foot.

If Almeida means that certain points are immune

from Constitutional protection, then there is no sensible test, nor is there any reason to dispute the Congressional judgment. On the other hand if the Terry rationale is applied then there is a sensible well-established test to determine which points might be the functional equivalent of the border, for purposes of a border type intrusion, and a sensible test that can be applied to determine the permissible scope of such an intrusion, which is a necessary consideration left unanswered by the conclusion that there are interior points immune from Constitutional protection, which once found would allow any manner of intrusion.

It is therefore submitted that in effect Almeida does no more than apply the Terry rationale to the border search situation.

POINT II

MALONE, NEW YORK, IS THE FUNCTIONAL EQUIVALENT OF THE BORDER.

If the Government's position under Point I prevails then under the Terry test, the functional equivalent of the border is an interior point which has the same characteristics that justify an intrusion at the border, i.e., a continuing institutionalized reasonable suspicion that any person or vehicle passing through that point may be or may not be transporting an alien not entitled to enter, and the need to make the intrusion at that point in order to effectively prevent illegal border crossings.

If the Government's position on Point I does not prevail then it is difficult to formulate any test for determining whether a particular point is the functional equivalent of the border. Without a sensible test the only guide is the suggestion of the Court in Almeida that a point near the border, marking the confluence

of two or more roads extending from the border may be the functional equivalent of the border.

Under either formula, Malone, New York, is the functional equivalent of the border. The easier to see is the latter formula suggested by the Court in Almeida. The map, (Petitioner's Exhibit 1), indicates that Malone is a point near the border, being only about 10 miles south of the border. It also indicates that it marks the confluence of two or more roads extending from the border, (Route 11 connects to the border crossing at Rouses Point and proceeds west roughly parallel to the border at distances of between 2 to 10 miles, before passing through Malone, where it then swings southwest into the interior of the United States; Route 30 connects to the border crossing at Trout River and proceeds to the border crossing at Ft. Covington and proceeds southeast through Malone where it converges into Route 30 and proceeds south into the interior).

If the suggestion of the Court in Almeida has any significance then it would be difficult to find a more appropriate example. Malone not only marks the confluence of two roads extending from the border it marks the confluence of every major highway in the area at the very point where they proceed south from the border, and Malone itself is not beyond the range of walking distance from the border, a person walking a mile every twelve minutes could walk the distance in two hours. It is therefore beyond dispute that Malone is a point which meets the characteristics suggested in Almeida for a functional equivalent of the border.

However, and this is the point which troubled the District Court in the instant case, even if you have a point which meets the characteristics of the suggested example in Almeida, there still must be a determination that an intrusion made at that point is permissible under the Fourth Amendment. Once again, at the interior point, we have an intrusion without probable

cause or a warrant or consent, and the only applicable rule is the rationale of Terry.

If the Terry test is applied three requisites must be established before Malone can be established as the functional equivalent of the border.

First, the existence of an institutionalized continuing reasonable suspicion that any person passing that point may be an illegal entrant must be established.

Second, that suspicion must be related to the Border Patrol's function to prevent or detect illegal entries across the border.

Third, the intrusion must be necessary at that point in order for the Border Patrol to carry out its function.

In effect, what we are looking for, as the District Court in the instant case points out, (Tr. Sept. 30, p. 7), is a substitute border, or more appropriately a substitute border crossing point. Therefore, the same characteristics which justified the intrusion at the border crossing must exist at the substitute crossing. The requirement that the suspicion be institutionalized and continuing is necessary since that is a characteristic of the border intrusion. If intrusions could be made based upon the random suspicion of an individual agent, no matter how reasonable, then the functional equivalent of the border would be any place that agent happened to be. (Note that our only concern here is the initial detention of the person or vehicle, and mere presence at that point is the basis for suspicion. The situation where a particular agent has reason to believe a particular person is an alien is not at issue.)

The requirement that anyone passing that point is suspect is necessary since that is also a characteristic of the border intrusion. Of course, once inside the border, regardless of where that might be, there is the added factor that the person detained may never have

crossed the border. Therefore, the suspicion that exists at the border that anyone who crosses the border may be attempting an illegal entry is inapplicable. However, inside the border the suspicion shifts to the suspicion that anyone at this point may have made an illegal entry.

The requirement that anyone passing that point is suspect does not mean that there must be a showing that most or many of the people passing through that point are aliens or aliens who have made an illegal entry, since even at the border most of the people crossing are not aliens or aliens attempting an illegal entry. The requirement merely requires a showing that if an alien made an illegal entry he would most likely pass through that point.

The second requisite that the suspicion be related to the function of preventing or in this case detecting illegal entries across the border distinguishes the functional equivalent situation from a detention made in say New York City, which the District Court in the instant case points out may be an even more fertile area for discovering aliens who had entered illegally. (Tr. Sept. 30, pp. 7, 8). There is a reasonable institutional suspicion that many illegal entrants may be found in New York City, based upon the institutionalized knowledge that big cities are the usual destination of illegal entrants because employment is easier to obtain in the city due to the need for cheap labor in the service industries, and since recent immigrants tend to congregate together because of language barriers and what-not they tend to do so in cities because they are less noticeable, etcetera. There is of course very little reason to believe that anyone passing through New York City may have made an illegal entry, even if it can be shown that an illegal entrant will most likely reach that point. The sheer volume of the traffic and the number of people would make the intrusion unreasonable. Moreover, the predicate of a reasonable suspicion case which justifies the

intrusion is that immediate action is necessary before the suspect leaves the officer's area of control. If New York City is the destination point then there is no need for immediate action or an intrusion since other sources of information are available, such as, employment records, etcetera.

The crucial distinction, however, is that a detention made in New York City would be for the purpose of discovering an alien who was illegally residing in the United States, and not for the purpose of detecting an alien who was trying to make good a recent illegal entry. (Note here that New York City is also located on an external boundary, but it is only accessible by boat, so the situation is quite distinct. The problem there is with seamen who "jump ship", but they usually enter lawfully, and simply do not return. Therefore, illegal entries are not a major concern).

The third requisite that the intrusion be necessary distinquishes a functional equivalent from say a detention made in Potsdam, which the map indicates might also fit the example suggested by Almeida. The deficiency of a point like Potsdam is that if an alien had made an illegal entry across the border he would have to pass through some more significant point closer to the border before he could reach Potsdam. Therefore, even if there were a reasonable suspicion that an illegal entrant would likely pass through Potsdam, a detention at that point would not be necessary or reasonable since he would have been detected at a point closer to the border where there is a greater probability that a detainee has crossed the border.

(Note that one of the controlling facts in Almeida was that the road where the detention was made was at all points north of a major highway. (93 S. Ct. 2537). If a car traveling on that road had crossed the border it would therefore have had to have crossed the major highway at some connecting point or points from the

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no vehicles are suspect and no intrusion can be made. (Note that some vehicles may be more or less suspect because of facts known to a particular agent which would make a particular intrusion more reasonable or less reasonable or even unreasonable depending upon the facts.)

Obviously, the suspicion here relates to the function of detecting illegal entries recently made at the border in this area, before the alien has reached a safe destination. At this point the illegal entrant is still traveling seeking to reach an interior destination, and in that respect the process of making an effective illegal entry is continuing and susceptible to detection.

Malone is furthermore the first significant interior point where there is a high probability that the activity to be detected is occurring. It is therefore the most logical and reasonable point at which detentions can be made.

All three of the suspected highways converge in Malone which certainly makes it logical to allow intrusions at that point if they are permissible at any point in the area. There is no point north or south of Malone which is more advantageous. Malone is therefore the closest significant point to the border in that area, and accordingly it is the most reasonable point in terms of the necessity of the Border Patrol to make intrusions at an interior point in order to carry out its function in a manner that is in conformity with the Fourth Amendment's mandate to be as unintrusive as is permissible.

Malone, therefore, meets all of the requisites of a functional equivalent of the border under the Terry test. There is an institutionalized continuing reasonable suspicion that any person or vehicle passing that point may be or be transporting an illegal entrant, based upon the institutional knowledge that illegal entrants will circumvent the designated entry point, and because of

the geography and road pattern in the area, such illegal entrants will most likely pass through Malone, which therefore, because of the inability to detect which vehicles may have crossed the border or which may be transporting illegal entrants, makes all vehicles passing that point suspect simply because of their presence at that point. That suspicion is related to the function of detecting illegal entries across the border, and intrusions are necessary at that point, since it is the closest point to the border in that area where it is feasible to check traffic.

It is therefore submitted that Malone, New York, is the functional equivalent of the border.

POINT III

THE ROVING PATROL IS LESS INTRUSIVE AND MORE REASONABLE THAN A FIXED INTERIOR CHECKPOINT.

If it is concluded that Malone is the functional equivalent of the border for purposes of a permissible border intrusion, then the next question is what kind of intrusion is permissible at such point, in terms of balancing the individual's right to privacy under the Fourth Amendment against the people's right to be protected from the activity to be detected and the needs of the agency charged with that function in view of the added factors that exist at the interior point, which made the situation at that point distinct from the situation at the border, to wit, the fact that detainees at the interior point may have already been checked at the border, and the fact that detainees at the interior point may never have crossed the border.

Almeida refers to intrusions made at an established station at a functional equivalent of the border, and indicates that this would be permissible. (93 S.Ct. 2539).

However, here again, this is only a suggested example, and the meaning of the term "established station" is not clear.

As indicated under Point I, the basis for finding the intrusion in Almeida objectionable was not per se because the detention was made by a roving patrol, but because there was no basis for believing that a detention at that point was necessary or reasonable. Obviously, as was indicated under Point I, even if there were an established station at the point the detention would nevertheless be defective for failure to show reasonable suspicion and necessity for the detention at that point, as the cases cited there from the Fifth and Ninth Circuits illustrate, in finding detentions made at fixed permanent and temporary checkpoints defective.

Note that in United States v. Daly, 493 F.2d 395, 396 (5th Cir. 1974), the Fifth Circuit with Almeida in view makes the suggestion that a particular stretch of highway may be a movable but only feasible and effective functional equivalent of the border, but they did not reach that issue. Moreover, the suggestion reflects the conclusion that Almeida, requires that the functional equivalent be a fixed point, unless there are some exceptional factors, and that if the detention is made by a roving patrol, regardless of where the detention is made, there must be probable cause. Cases in other circuits can be read to imply the same notion of a fixed point. (United States v. Cullen, 499 F.2d 545 (9th Cir. 1974); United States v. King, 485 F.2d 353 (10th Cir. 1973).

There are some cases decided after Almeida-Sanchez with Almeida in view, involving roving patrols, which hold that Almeida is inapplicable when the initial detention is based upon reasonable suspicion and sufficient nexus to the border, which is in effect the Terry rationale. See, United States v. Henriquez, 483 F.2d 65 (5th Cir. 1973), cert. denied, 94 S.Ct. 728 (1973);

United States v. Steinkoenig, 487 F.2d 225 (5th Cir. 1973), which rely upon the rationale of the Second Circuit in United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. denied, 393 U.S. 1121, 89 S.Ct. 999 (1969), which reasoned that an individual in a border area with direct contact to the border is a member of a class with sufficient nexus to the border so that a border search predicated on reasonable suspicion is permissible, even if conducted by a roving patrol at a reasonable distance from the border. See, also, United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), cert. denied, 94 S.Ct. 881 (1974), holding Almeida not applicable to a roving patrol detention predicated upon founded suspicion.

There is therefore some confusion as to whether Almeida requires that a detention made by a roving patrol, regardless of where it is made, must be based on probable cause. Almeida, citing, Carroll v. United States, supra, states that travelers in the United States have a right to free passage without interruption and search unless there is probable cause that their vehicle contains contraband. (93 S.Ct. 2540). However, that statement is merely a reflection of the general rule applicable to the facts of that case. Interruptions and searches at fixed points, which Almeida allows, are just as much an infringement of the right of free passage of detentions made by a roving patrol.

Properly read, all Almeida says, is that a detention cannot be made anywhere unless it is based upon a reasonable suspicion that the activity to be detected is occurring there, and it is necessary to make a detention there, in order to effectively perform the function of securing the border against illegal entries. That statement of law is consistent with the rationale of Terry and with the Second Circuit's reasoning in United States v. Glaziou, supra.

The foundation for holding Almeida inapplicable to those roving patrol cases decided after Almeida, i.e., that the detentions were justified because the particular agent making the initial detention had a "founded" suspicion are without merit. Almeida, specifically holds that an automobile cannot be detained within the United States without probable cause unless it is at the functional equivalent of the border. As previously indicated if an individual agent can make a detention based upon founded suspicion within his own personal knowledge then he can make a detention anywhere. Almeida specifically says he has to be at a functional equivalent and therefore it makes no sense to argue he can make a detention on "founded" suspicion.

It furthermore makes no sense to argue that a functional equivalent of the border can be anywhere other than a place where there is a reasonable suspicion creating a necessity to make intrusions without probable cause. The reasonable suspicion at such a point, as previously indicated can only be an institutionalized and continuing suspicion or else the functional equivalent fluctuates depending upon the agent and the time the detention was made. If that were true there could never be such a thing as a permanent fixed checkpoint.

There are only three plausible or sensible possibilities. A detention can never be made by a roving patrol without probable cause; a detention can be made by a roving patrol at the functional equivalent of the border, if in addition to the institutionalized suspicion that creates the functional equivalent of the border, the agent making the detention has additional knowledge which creates a "founded" reasonable suspicion as to a particular vehicle; a detention can be made at a functional equivalent of the border by any reasonable method including the roving patrol.

If the Terry rationale is applied all that needs to be done to discover the most rational interpretation is to

determine whether a roving patrol is necessary and reasonable at the border, and if so whether the conditions that make it necessary and reasonable at the border also make it necessary and reasonable at the functional equivalent of the border.

Obviously there are many more places to cross the border than at the designated entry points. Many if not most illegal entries are made by circumventing the designated entry point. A checkpoint could, or course, be placed at every conceivable entry point, but even if this were feasible and sensible it would still not prevent or detect aliens entering on foot through fields who are picked up on the road crossings on the American side of the border. The only way to prevent that would be to have an electrified fence spanning the entire distance of the border with a sentry every twenty feet in a gun tower, but since there is something about walls and fences and gun towers that makes them anathema to the American's notion of what a free and open society ought to reflect to societies which are greatly enamoured by walls and fences and gun towers, that the option of closing our borders to intruders under penalty of death before trial has never been thought to be feasible or particularly desirable.

On the other hand, limiting our efforts to detect illegal entries to only the designated border entry points has never been thought to be particularly intelligent or desirable either, since if we did so, the only persons one would expect to see at the designated entry points would be those who were entitled to enter, in which case we wouldn't need any designated entry points, since there wouldn't be any need to check.

Therefore, a roving patrol of the back roads extending from the border has always been thought to be reasonable in the area immediately adjacent to the border. United States v. Glaziou, supra. A road crossing the border need not be a functional equivalent of the border;

it is the border. If it were reasonable but not feasible to have checkpoints at all the roads crossing the border it's inexplicable why a roving patrol of those roads within even ten miles of the border is unreasonable in view of the fact that at 60 M. P. H. it only takes ten minutes to travel that distance. Most of the back roads extending from the border are protected by sensing devices which indicate when a vehicle has crossed the border but it requires some time for the roving patrol to respond and therefore even if the vehicle were not intercepted until it was ten miles inland from the border, it is difficult to see why that interception is unreasonable. Moreover, since not all the roads are protected by sensors, and since no sensing device is infallible or immune from tampering or incapable of being circumvented in some manner, it would also not be unreasonable to routinely patrol those back roads extending from the border within ten miles of the border.

As suggested by the Fifth Circuit in United States v. Daly, supra, the entire stretch of that road, at least within a reasonable distance of the border is the functional equivalent of the border, or more aptly put, an extension of the border and the only feasible and effective way to detect illegal entries on those roads is by roving patrol.

Under the Terry rati nale therefore there is an institutionalized continuing reasonable suspicion that the activity to be detected is likely to be occurring on those roads and, if it is to be detected and prevented, it is necessary to detain vehicles using those roads and the only feasible or sensible method of detaining vehicles on these roads or of detecting and detaining entrants on foot is by using a roving patrol. It is therefore not unreasonable under the Fourth Amendment to use roving patrols to secure these back roads extending from the border from illegal entries, within a reasonable distance from the border.

Note here that the back roads extending from the border in the Malone area, i.e. between Ft. Covington on the border west of Malone and Frontier on the border east of Malone, specifically Route 95 west of Malone from Dundee on the border to Moria on Route 11, and the unmarked road east of Malone from N. Burke on the border to Burke Center on Route 11, and the connecting interior back roads within the United States between the section of Route 95 west of Malone and the unmarked road east of Malone traveling north of Route 11, are within the roving patrol area of the Malone border patrol line station located in Malone. The reason for this is quite obvious from inspection of the map. (Pet. Ex. 1). Those roads are more easily patrolled from Malone because the access to them is better from Malone than from the border entry points at Ft. Covington, Trout River and Chateaugay, particularly if in response to a sensor being tripped, as for example a chase from Trout River, after a vehicle entered on Route 95 heading south at a high speed, would be much more difficult than an intercepting chase west from Malone on Route 11 and then north on 95. Moreover, the use of Malone as a base for the roving patrol allows protection for all three of the border entry points in the area because of Malone's strategic location at the center of the three points. Furthermore, if a roving patrol is permissible on those roads, it makes little difference where the patrol car originates, particularly if he is out roving.

However, the fact that Malone is the base for the roving patrol in that area, if patrols on those back roads north of Route 11 are permissible, necessarily would imply the authority to patrol Route 11 east and west of Malone to some point a little beyond the points where the two back roads extending from the border connect to Route 11, such as Lawrenceville on Route 11 west of Malone and since Chateaugay is a fixed entry point on Route 11 east of Malone, to a point three or four

miles east of Chateaugay, which is necessary to detect entries on foot circumventing Chateaugay.

The justification for patrolling Route 11 in that area is based upon the institutionalized continuing reasonable suspicion that vehicles and persons on foot in that area of Route 11 may have arrived there by use of those interior back roads, and even if Malone were another fixed checkpoint traffic heading in the direction of Malone would still be suspect since a vehicle might take one of the connecting roads south of Route 11 before reaching Malone.

Therefore, the use of a roving patrol to check traffic on Route 11 east and west of Malone would also not be unreasonable under the Terry Fourth Amendment test since it would be based on reasonable suspicion and necessary to prevent and detect the use of entry roads from Canada which were not protected by a fixed designated entry point, since a roving patrol would be the most feasible and practical method of checking traffic on those roads.

Without even considering whether the use of a roving patrol would be reasonable at the functional equivalent of the border it is clear that its use is reasonable to protect the border itself, from entries made by circumventing the designated entry points, which necessitates patrolling the roads east, west, and north of Malone between Ft. Covington and Frontier on the border.

When it is considered that the use of a roving patrol would be reasonable to protect the border itself it logically follows that its use would be not only reasonable but for the same reason necessary at the functional equivalent of the border; i.e., to protect against circumvention of the functional equivalent of the border.

If Malone is the functional equivalent of the border, and only fixed permanent or temporary checkpoints

are permissible at Malone itself, and a roving patrol cannot be used to protect against circumvention of Malone then there is no reason to have any kind of checkpoint at Malone.

The very purpose for having a checkpoint at Malone is to detect entrants who have eluded the fixed checkpoints at the border. The premise is therefore that we are dealing with individuals who know how to beat the system. If Malone is another stationary checkpoint, through which every vehicle heading south or west is checked, or even if temporary roadblock checkpoints are used to check the traffic heading south and west out of Malone on Routes 30 and 11 at irregular times, the problem for the professional is simply solved by avoiding Malone. Unless the alternate routes east and west of Malone between Ft. Covington and Frontier on the border including the sections of such routes south of Route 11 are also checked by some means, i.e., Route 95 west of Malone, which turns into Route 72 south of Route 11 and then connects to Route 30 some twenty miles south of Malone and the offshoot unmarked road from Route 72 which connects to Route 30 at Paul Smiths some thirty miles from Malone, and Route 11A south from Brushton on Route 11, and Route 122 south from North Bangor on Route 11, which also both connect to Route 30 south of Malone, and Route 374 east of Malone south from Chateaugay on Route 11 to Brainardsville, then there is practically no reason to have any checkpoint at Malone, and particularly not a fixed type of checkpoint through which every vehicle must past.

The suspects for which the checkpoint is designed to detect will most likely not pass through that point therefore the predicate for its justification, i.e., the reasonable suspicion that they will most likely pass through that point is greatly diminished if not eradicated. Moreover the people most likely to be detained or those forced to bear the burden of the intrusion, particularly if the checkpoint is fixed and all vehicles are checked, are

those who have already been checked at the border or those who never have crossed the border, especially if they work or shop in Malone and reside outside of Malone, (What is the effect of that on the business community in Malone ?), or in essense the people most likely to be checked are the very people who don't need to be checked. The necessity for the checkpoint is therefore, also, greatly diminished or abrogated.

If the objective is to be as unintrusive as permissible consistent with the need to make an intrustion, as it should be whenever the right of the individual and the right of society is balanced under the Fourth Amendment, is it even arguable, that a fixed checkpoint at Malone, itself, without any checking of the alternative routes to protect against circumvention of Malone, is the most unintrusive method of checking traffic at a functional equivalent of the border, when simple logic indicates that such a method is no longer based upon a reasonable suspicion or a need to make any intrusions at that point ?

The idea of a fixed checkpoint in Malone without the use of the roving patrol to detect entrants circumventing Malone is therefore totally unreasonable under the Fourth Amendment by any standard. The concept of the fixed interior checkpoint is therefore deficient, unless fixed checkpoints are used throughout the area to prevent circumvention of Malone. Such a system could be devised, such as placing checkpoints at all of the strategic nodel intersections, i.e., at Moria, Brushton and North Bangor on Route 11 west of Malone, and Burke Center on Route 11 east of Malone, as well as Brainardsville on Route 374 south of Chateaugay, and at Duane and Paul Smiths on Route 30 south of Malone, as well as Malone, itself.

One flaw with this system, as a matter of practicality, is that the creation of eight checkpoints in place of one requires a sevenfold increase in manpower. (Note that at any one time the line station border patrol roving

patrol at Malone has no more than two agents on duty). That by itself, however, would not preclude requiring such a system, since the protection of a constitutional right should not depend upon the fact that it is less expensive to deny what the Constitution requires.

The crucial defect in such a system is the fact that it insures multiplicous checking. Note, for example, that an entrant who is checked at Trout River on Route 30 would have to be checked again in Malone since he may have connected to Route 30 south of Trout River, after entering 95 and using the interior back roads, since he could not take 95 south, he would then be checked again on Route 30 south of Malone, because of the likelihood one of the fixed points on Route 11 would be by-passed by having the alien walk around it, and for the same reason he might be checked a fourth time at Paul Smiths, the last checkpoint. Other similar problems are apparent, such as the fact that traffic heading north on Route 30 would be checked to detect entrants who circumvent the checkpoint at the intersection of Route 72 and 30 and then double back north.

More importantly, there is nothing constitutionally unreasonable about a roving patrol per se. Clearly the parameters of a functional equivalent of the border cannot be limited to a simple spot within the area of the border to be protected, nor does Almeida say that it is limited to a single spot. The physical dimensions of a functional equivalent must be as broad as is necessary to protect that specific section of the border it is designed to protect. Therefore it is not a single spot but an area. The question is not where shall the fixed point be, but rather, what is the best way to check the traffic in this area.

A roving patrol is in fact the method used, in the area of Malone. A roving patrol in this area, as outlined above, is reasonable under the Fourth Amendment since it would be predicated upon reasonable suspicion

and need as is the border it is designed to protect, itself. The modus operandi of smugglers and successful illegal entrants of avoiding fixed checkpoints, makes their use at interior areas questionable, since the requisite suspicion and need is diminished at such checkpoints.

Moreover, since a fixed checkpoint by design detains all vehicles despite the diminished suspicion and need it is in effect more intrusive then a roving patrol system, which merely spot checks traffic in an area where there is the requisite suspicion and need. As a practical matter an agent on a roving patrol is not going to stop every vehicle he sees, since that would be time consuming and wasteful. He is going to be selective. He is going to look for vehicles that arouse some additional suspicion in his mind other than their mere presence on the road, such as, a license plate that is foreign to that area, characteristics of the vehicle or its occupants or the manner of its operation, etcetera, which will arouse some added suspicion, which may or may not be the "founded" suspicion referred to by the cases, but which will be more than mere presence.

However, if mere presence at a fixed checkpoint at a functional equivalent area is sufficient then there is no reason to require "founded" suspicion for roving patrols in a functional equivalent area, especially since the roving patrol detention by its very nature will be founded upon more suspicion than exists at a fixed checkpoint. Similarly since the institutional suspicion and need is continually present in a functional equivalent area there is no more need for a warrant for a roving patrol than for a tempoary or permanent fixed checkpoint or for the border itself.

Based on the facts that the institutional suspicion and need is greater when the detention is made by a roving patrol, and the fact that it will be predicated upon more than the vehicle's mere presence on the road and therefore will be more likely to detect the activity

to be detected, it must be concluded that the roving patrol is the most effective and feasible method to use, and such use is consistent with the mandate of the Constitution.

Similarly, for the same reasons, it is less intrusive in terms of the total numbers detained and the type of detainee to be expected and more reasonable in terms of the degree of suspicion present and the necessity for the intrusion.

It is therefore submitted that the roving patrol is less intrusive and more reasonable than fixed checkpoints.

POINT IV

THE DETENTION OF THIS PARTICULAR BUS WAS REASONABLE.

The first question is whether there is an institutional continuing reasonable suspicion to detain a bus. Obviously there is the institutional knowledge that illegal entrants do enter by foot or by boat and do not have automobile transportation. (Note Tr. Sept. 27 p. 35-36; 40-41) The most likely alternate mode of transportation in this area is the bus. Moreover, the modus operandi of smugglers is to take the alien to the border entry point, have him walk around it, pick him up on the other side, and take him to where the nearest alternate means of transportation is available. Sometimes the smuggler does not pick up the alien on the other side of the border and sometimes the smuggler can't find him, in which case those aliens will also have to use the bus to go south. Usually, however, the alien will be picked up, but the smuggler will seek to disassociate himself from the alien as soon as possible, for the obvious reason that the sooner he can rid himself of the alien the less chance there is he will be detected, especially since he will most likely be Canadian or at least not

from the local area, (An American especially a local resident would arouse suspicion by numerous crossings), therefore his license plates would be foreign to the area, and hence his vehicle would be suspect, particularly if he uses the back roads.

The smuggler, therefore, has some strong incentives to cut loose the alien as soon as he can, especially if the alien cannot speak English and has no travel papers, since once within the United States the smuggler's prime concern is his own protection. However, if he is a professional, and they are the major targets of detection, he will not simply ditch the alien, for three good reasons. First, only a dumb alien would pay him before he was picked up on the other side of the border. Second, since he is in the business, he wants the alien to make it safely, since he knows the alien is likely to assist other aliens, such as family and friends from the old country, in obtaining entry into the United States, and therefore the alien is likely to send business to him, which can be considerable, in view of the fact that recent immigrants tend to congregate in large self-contained areas, and it is the alien who successfully enters illegally who will pay or supply the money for bringing in others. Third, if the alien is caught, he does not want the alien to be angered, and as a result reveal the smuggler's identity or operation.

Therefore, he will not just dump the alien on the road, on the other hand he will not take him very far inland because the alien, especially those not literate in English, will arouse suspicion wherever he may be, even beyond the 100 mile radius, and this could lead to detection of the smuggler. The logical choice is to take the alien to the nearest relatively safe point where other means of transportation is available. If the alien does not have friends meeting him, and since his contacts in America are likely other illegal entrants they won't want to go near the border, the logical choice is the nearest bus station.

Buses and bus stations at points near the border are always suspect. The smuggler, with a non-English speaking alien is therefore not going to hang around the bus station with the alien or let the alien hang around the bus station either. The normal procedure is for the smuggler to purchase the ticket for the alien on a south-bound bus that does not require the alien to change buses, and preferably a bus which travels non-stop from the border area to the alien's destination, which is usually a big city, such as New York. No great mental effort is required to determine the time schedules and routes of the buses in the area, all that is necessary is to pick up a schedule at the bus station, and purchase a ticket for an appropriate bus. Moreover, since we are in a rural area local travelers will use the large interstate bus carriers as local transportation since there will not be local or county bus service. It is therefore known that these buses will make frequent local stops to pick up and debark passengers in these local rural areas, since someone traveling from Massena to Morgansburg is not going to take the bus all the way to Malone, nor travel to Massena in order to catch a bus to Malone if he is going from Morgansburg to Malone. Therefore a bus using the major highways in this area is accessible to illegal entrants not only at the bus stations but all along the route the bus travels in this area. A smuggler can therefore pick up a bus ticket for the alien, and sometimes these are available in stationary stores etcetera in the local rural town, and put the alien on the bus at some intermediary point along the bus route without having to actually take the alien to the bus station, where the danger of detection is greater.

All of this matter is within the institutional knowledge of the border patrol service, and therefore there is an institutional continuing suspicion that buses in this area may be transporting illegal entrants. Moreover, that suspicion is even greater with respect to a bus than a car, since not every car will be suspect, whereas, the

same suspicion exists as to every bus for which the institutional suspicion exists.

Some buses are of course not suspect and some are less suspect than others. One of the factors to consider is whether it ever crosses the border. However, the District Court in the instant case misconstrues the significance of that factor in holding that since the particular bus in question there never crossed the border it was not therefore suspect. (Tr. Sept. 30 p. 7, 8).

If the bus traveled from a point in Canada non-stop to Malone that bus would not be suspect at all, since the bus will not circumvent the border crossing, and therefore it would have been checked crossing the border. Similarly, if it originated in the United States and crossed the border and then recrossed the border it would be checked at the border again, therefore unless it made intermediate stops it would not be necessary to check it at Malone, except for passengers who might board it at Malone. Moreover, since it is known that a bus which crosses the border will be checked there is always less suspicion and need to check it again at a nearby interior point.

The bus that arouses the greatest suspicion and need to check is a bus that originates at a point within the United States, which is near the border and accessible to illegal entrants, which then travels along a route near the border which is also accessible to illegal entrants, and which never crosses the border, before swinging south into the interior of the United States, and which does not require the alien to change buses before reaching a safe destination beyond the previously recognized statutory reasonable distance.

Therefore based on the service's institutional knowledge and logic the bus which crosses the border is less suspect than the bus which does not cross the border, and accordingly the District Court's conclusion in the instant case was erroneous. That finding by the District

Court was perhaps the most significant basis for concluding that the detention of that particular bus was unreasonable, but inasmuch as that finding, under closer view, was in error it is submitted that the conclusion that the bus was unlawfully detained is also error.

The facts in the instant case which can be evaluated by the testimony of the agent and the bus station attendant, (Tr. Sept. 27 pp. 38-45; 63-64 and 67), with the aid of the map, (Pet. Ex. 1), indicates the following points:

The bus originated in Massena, New York, a point near the border, roughly three miles distant from the St. Lawrence river which separates Canada from the United States in this area, and a point which is easily accessible to illegal entrants crossing by boat or by circumventing the border checkpoint at Rooseveltown, which is roughly six or seven miles distant to the northeast of Massena, and it is the largest town in the area with a bus station.

Accordingly, Massena, itself, is a point which would be the functional equivalent of the border. See, United States v. Byrd, 483 F. 2d 1196, 1199, n. 7, (5th Cir. 1973), which suggests that an area contingent to a river which marks the boundary of the border is the functional equivalent of the border. Under the Terry test note that Massena, as was the case with Malone, is the first significant interior point from the border through which the illegal entrant would have to pass and therefore based upon reasonable suspicion and need it is the functional equivalent of the border.

Note that analysis indicated that Potsdam although within the suggested example of Almeida was deficient because there was a closer more significant point through which the entrant would have to pass before reaching Potsdam, and therefore it was unreasonable to check in Potsdam. That more reasonable point is Massena, since at Massena the traffic on Route 56 to Potsdam can be effectively checked.

After leaving Massena, the bus travels north and east on Route 37, which runs parallel to the border at a distance of roughly two miles from the border, passing by the border crossing points at Rooseveltown and Ft. Covington, before swinging south from Westville on the border, where Route 95 crosses the border and proceeds south into Malone, where it then converges onto Route 30 heading due south from Malone.

The bus by schedule is non-stop from Massena to Malone but pursuant to the institutional knowledge of the service it is known that it makes intermediate stops and picks up passengers enroute. (Tr. Sept. 27, p. 43). Therefore that particular bus is accessible to illegal entrants circumventing the border crossings at Rooseveltown, Ft. Covington and Trout River. Moreover, since it never crosses the border it is more suspect since it is the type of bus an illegal entrant will take, and this fact is further supported by the additional fact that the destination of the bus was New York City. (Tr. Sept. 27, p. 63, 64).

On these facts it would be difficult to imagine a more suspect bus, and therefore the detention of this bus would be reasonable based upon reasonable suspicion and need, unless there are some other factors negating the institutional suspicion, which were known to the agent making the detention.

The only other factors are the agent's testimony, (Tr. Sept. 27, pp. 43, 44), that when he detained the bus he asked the driver whether he had made any stops enroute from Massena and the driver related he had not, but the agent also inquired whether the bus had been checked in Massena, and the driver related that it had not been checked in Massena.

The question is whether this knowledge negates the pre-existing reasonable suspicion that an illegal entrant may be on that bus.

The agent indicated in his testimony that if the driver told him the bus had been checked at Massena and had not picked up anyone enroute to Malone, that he would not have checked the bus, since there would be no point in checking the passengers again, which certainly indicates reasonableness on his part.

However, as to the allegation that the bus had not picked up passengers enroute, by the driver, the agent need not have accepted the driver's allegation as being a true representation, since the driver is not an official source. Without inferring anything disparaging the driver may not have told him the truth for various reasons; bribery, sympathy for the alien, not wanting to be delayed etcetera. Therefore the agent need not have accepted the driver's representation as to that fact, and if he disputed the driver, he could have interrogated the passengers.

As for the driver's representation as to whether the bus was checked in Massena, the driver would have to be believed, since the agent could have checked that himself by contacting Massena. Here, of course, the driver says he was not checked in Massena, so even if the agent believes that no passengers were picked up enroute, he is nevertheless compelled to check the passengers in Malone, pursuant to his duties, because of the continuing institutional reasonable suspicion that an illegal entrant might have boarded the bus at Massena, which is also a functional equivalent of the border.

The only reason for finding the interrogation of the passengers, as to their citizenship, in Malone unreasonable is the argument that the bus should have been checked in Massena and therefore it can't now be checked in Malone.

That argument, however, ignores the facts. The bus was not checked at the functional equivalent in Massena. It is now at another functional equivalent, and there is a suspicion that entrants may have boarded enroute. The detention of the bus was therefore reasonable. The fact that it was not checked in Massena makes it mandatory

to be checked at Malone because when the bus leaves Malone it heads south and will never be checked. If the agent is to do his job he must check those passengers.

Moreover, because of the fact that the bus makes stops enroute from Massena to Malone there is more reason to check it in Malone than at Massena, since it might have to be checked again in Malone. Therefore, if one of those points were to be eliminated the most logical point to eliminate is Massena.

The prime concern for agents checking in Massena are the buses heading south on Route 56. Buses heading east or west on Route 37 will be picked up again at Ogdensburg and Malone, and if double checking is to be avoided it makes more sense to eliminate Massena. However since entrants may debark as well as embark the bus between Massena and those points it would still not be unreasonable to check those buses in Massena. The system of relying upon the driver's representations to avoid double checking in those circumstances is not unreasonable. The fact that the bus could have been checked in Massena, however, is not significant, especially in view of the fact that an agent in Massena is more concerned with buses heading south, and if there is not time to check the bus to Malone he is not overly concerned since it will be picked up again in Malone.

At all times that bus is present at the functional equivalent of the border, until it heads south from Malone. If it were a suspect car it could be stopped at any point in that area. The question to ask is where is the most reasonable point to detain that bus. That point on the facts here is Malone, since when it leaves Malone it is then safely within the interior of the United States. To say that it can't be checked in Malone because it could have been checked in Massena is to reduce criminal detection to the level of a monopoly game. The point being that since it might have been checked at

any point or at either Massena and Malone both, the fact that it was not checked at Massena made it mandatory to check it at Malone.

It is therefore submitted that the limited interrogation of the passenger at Malone was reasonable, and accordingly the subsequent discovery that the defendant was an alien without proper travel documents made the arrest and seizure of his passport and bus ticket lawful.

It is therefore submitted that the dentention of the bus was reasonable.

CONCLUSION

THE ORDER GRANTING THE DEFENDANT'S MOTION TO SUPPRESS WAS THEREFORE IN ERROR AND SHOULD BE REVERSED.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney

By: s/ THOMAS P. O'SULLIVAN

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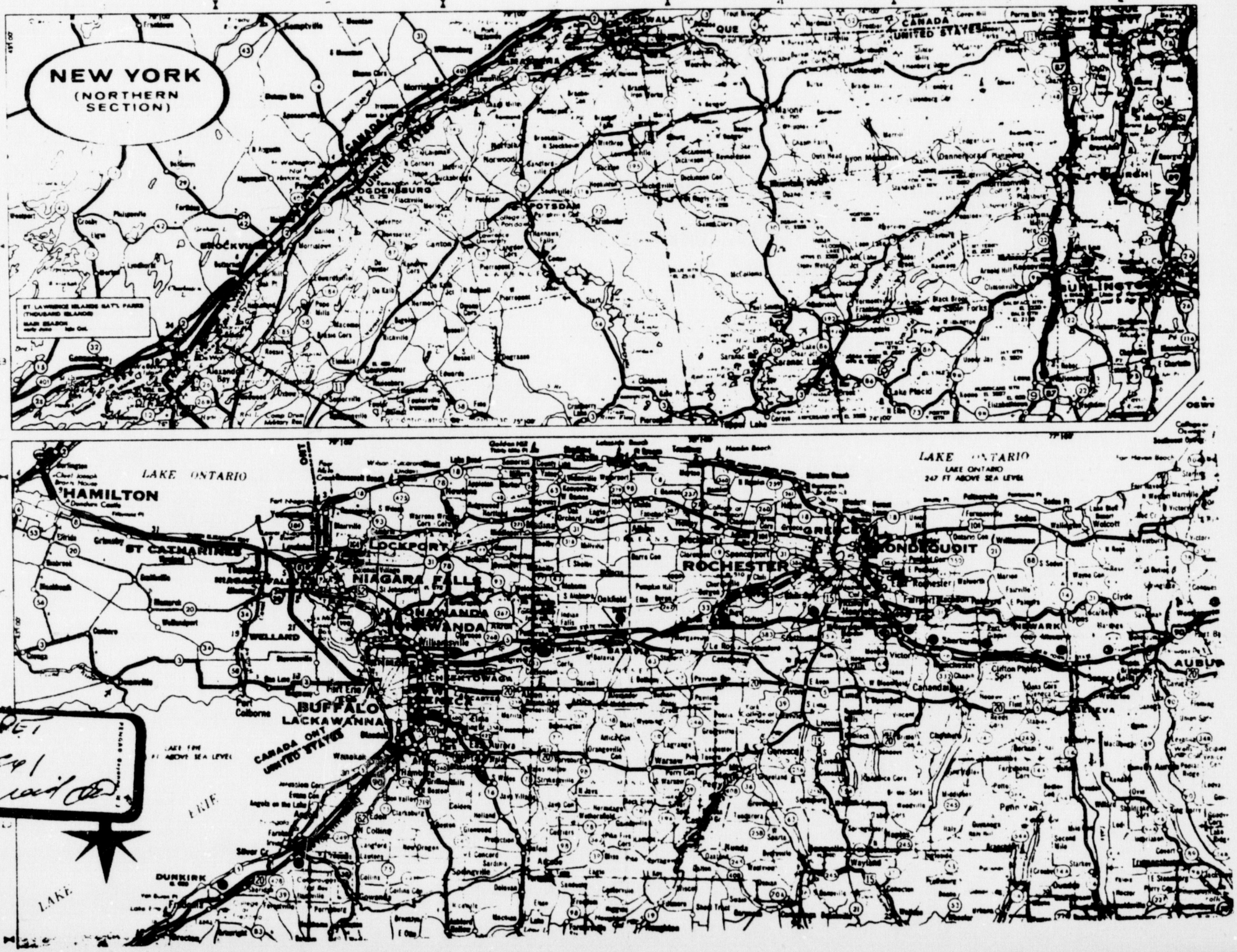

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COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

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